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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Doris Ann Warcola,

10 Plaintiff,

11 v.

12 John Halikowski,

13 Defendant.

No. CV-13-08264-PCT-DGC

ORDER

14 Defendants have filed a motion to dismiss pursuant to Rule 12(b)(6). Doc. 5. The
15 motion has been fully briefed. Docs. 9, 10. Neither party has requested oral argument.
16 For the reasons stated below, the Court will grant the motion.

17 **I. Legal Standard.**

18 When analyzing a complaint for failure to state a claim to relief under Rule
19 12(b)(6), the well-pled factual allegations “‘are taken as true and construed in the light
20 most favorable to the nonmoving party.’” *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th
21 Cir. 2009) (citation omitted). Legal conclusions couched as factual allegations “‘are not
22 entitled to the assumption of truth,” *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009), and
23 therefore “‘are insufficient to defeat a motion to dismiss for failure to state a claim,” *In*
24 *re Cutera Sec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010) (citation omitted). To avoid a
25 Rule 12(b)(6) dismissal, the complaint must plead “‘enough facts to state a claim to relief
26 that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This
27 plausibility standard “‘is not akin to a ‘probability requirement,’ but it asks for more than
28 a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678

(quoting *Twombly*, 550 U.S. at 556). “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not ‘show[n]’ – ‘that the pleader is entitled to relief.’” *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)). Dismissal is appropriate where the complaint lacks a cognizable legal theory, lacks sufficient facts alleged under a cognizable legal theory, or contains allegations disclosing some absolute defense or bar to recovery. *See Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.1988); *Weisbuch v. County of L.A.*, 119 F.3d 778, 783, n. 1 (9th Cir.1997).

II. Analysis.

A. Plaintiff’s Complaint.

Plaintiff’s handwritten complaint asserts that the Arizona Department of Transportation (“ADOT”) is taking her property, located at 1080 White Spur Rd. in Prescott, Arizona, for a road project on Route 89 in Prescott, leaving her no space for parking her vehicles and “rendering [her] property unliveable and unsellable.” Doc. 1 at 2. Plaintiff alleges that she is concerned for her personal safety in light of a proposed “new right-away [sic] so close to [her] property.” *Id.* Attached to the complaint are a series of photographs of Plaintiff’s property and the road construction taking place near it. Plaintiff also filed a motion to “cease and desist ADOT’s Route #89 Road Project,” demanding that ADOT “stop the taking of my property, causing me no parking, until it’s been settled by the court.” Doc. 2 at 1-2. The complaint demands that Defendants “Leave 1080 White Spar Road property alone or buy me out.” Doc. 1 at 1.

The complaint contains virtually no facts and no plausible claim for relief. Other than stating “Complaint, Inverse Condemnation,” the complaint fails to state the legal nature of Plaintiff’s claims or the basis for this Court’s jurisdiction.

B. Motion to Dismiss.

ADOT argues that this case should be dismissed because Ms. Warcola has not exhausted all available state remedies, has failed to comply with A.R.S. § 12-821, and is attempting to litigate an issue that has already been determined by a state court. Doc. 5 at

1 1. Defendants claim that “there is existing Arizona law that provides a cause of action in
2 inverse condemnation,” but that Plaintiff has failed to utilize it and that, therefore, her
3 action in federal court must be dismissed.

4 Plaintiff has not cited 42 U.S.C § 1983 or the Takings Clause of the U.S.
5 Constitution as the basis for her claim, but the complaint fails as a matter of law even if
6 the Court construes it as asserting such claims. A violation of the Takings Clause does
7 not occur until just compensation has been denied, and Plaintiff must use available state
8 procedures to seek such compensation before bringing a § 1983 takings claim in federal
9 court. *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 687 (9th Cir. 1993). In
10 Arizona, “the legislature, pursuant to its grant of authority under Ariz. Const. art. 2, § 17,
11 has provided statutory remedies for acts of eminent domain, *see* A.R.S. § 9–518, and
12 inverse condemnation, *see* A.R.S. § 11–972 and A.R. S. § 12–1111 *et seq.*” *City of*
13 *Phoenix v. Superior Court In and For Cnty. of Maricopa*, 762 P.2d 128, 132 (Ariz. Ct.
14 App.1988). For inverse condemnation actions, A.R.S. § 12-1124 provides the remedy of
15 compensation and money damages. *Id.* Because Arizona law provides an adequate
16 remedy for takings, Plaintiff must pursue that claim before asserting a taking claim under
17 the Fifth Amendment. *See Austin v. City and Cnty. of Honolulu*, 840 F.2d 678, 682 (9th
18 Cir. 1988). The proper disposition for an unripe federal takings claim is dismissal
19 without prejudice. *See Macri v. King County*, 126 F.3d 1125, 1129 (9th Cir. 1997).

20 **C. Motion to Cease and Desist.**

21 Plaintiff asks the Court to order ADOT to stop its road project on Highway 89 and
22 to stop the “taking” of her property until this case has been resolved. Doc. 2. Defendant
23 argues that this request is without merit because it is a state court issue that has already
24 been decided. Doc. 5 at 3. Specifically, Defendants assert that their request for
25 immediate possession was the subject of a hearing before the Arizona Superior Court of
26 Yavapai County on October 8, 2012, in which an Order for Immediate Possession was
27 granted to the condemning agency. Doc. 5 at 4.

28 Arizona law allows the taking of private property for a public use. A.R.S. § 12-

1111 *et seq.* A road, street, or alley “for the benefit of a county, city, town or village” is considered an acceptable use under Arizona law. *Id.* at § 12-1111(6); *see also Oury v. Goodwin*, 26 P. 376, 378 (Ariz. 1891). Upon filing a complaint under § 12-1111 *et seq.*, “plaintiff may apply to the court for an order permitting the plaintiff to take possession of and use the property sought to be condemned.” A.R.S. § 12-1116. This statute allows the agency condemning the property to take immediate possession of the condemned property. *Desert Waters, Inc. v. Superior Court In & For Pima Cnty.*, 370 P.2d 652 (Ariz. 1962) (finding the immediate possession statute constitutional). Defendants assert that the unresolved issue of just compensation for Plaintiff is currently pending in that condemnation proceeding. Doc. 10 at 3.

Given the pendency of the state condemnation action, and Plaintiff’s failure to articulate any grounds upon which the Court could issue injunctive relief in this matter, Plaintiff’s request to order ADOT to cease and desist is denied.

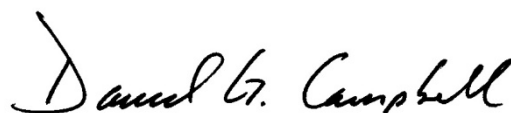
III. Leave to Amend and Plaintiff's Obligations.

In this circuit, “[a] pro se litigant must be given leave to amend his or her complaint unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment.” *Karim–Panahi v. L.A. Police Dep’t*, 839 F.2d 621, 623 (9th Cir.1988). The deficiencies in Plaintiff’s complaint cannot be cured by amendment given the pendency of the state condemnation action.

IT IS ORDERED:

1. Defendant’s motion to dismiss (Doc. 5) is **granted**.
2. Plaintiff’s motion to order ADOT to cease and desist is **denied**.
3. The Rule 16 Case Management Conference set for August 30, 2014 at 4:00 p.m. is **vacated**.

Dated this 30th day of January, 2014.



David G. Campbell
United States District Judge